

Part 135 operations when he was not properly qualified to do so.² While affirming all of the regulatory charges alleged, the law judge reduced the sanction sought from a 120 to a 75-day suspension of respondent's commercial pilot certificate.³

On appeal, respondent raises two discrete issues: 1) that he was unfairly prejudiced and denied due process by the law judge's refusal to grant the Motion for Continuance filed by respondent's new counsel when his former counsel withdrew from the case; and 2) that the law judge's finding of a violation of FAR section 91.13(a) is not supported by the evidence and is contrary to applicable law and public policy.⁴ We are persuaded by neither argument and, thus, affirm the oral initial decision.

We see no indication that the law judge abused his considerable discretion by denying respondent's request for continuance. The hearing, originally scheduled for July 7, 1998, was continued to November 17, 1998, to accommodate both a scheduling conflict of the administrative judge and scheduled military training of respondent's counsel. Order of Continuance

²Specifically, the Order of Suspension (complaint) contained two counts. Count I alleged a violation of sections 135.63(d), 135.293(a) and (b), 135.299(a), and 91.13(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 91 and 135. Count II alleged violations of sections 135.243(c)(2), 135.293(a) and (b), 135.297(a) and (b), 135.299(a), and 91.13(a). These sections of the FAR are reproduced in the Appendix, attached.

Part 135 operations are those subject to the regulations in 14 C.F.R. Part 135.

³The Administrator did not appeal the reduction in sanction.

⁴The Administrator filed a brief in reply.

and Amended Notice of Hearing, June 11, 1998. Three weeks before the hearing, his counsel, "in mutual agreement with respondent," withdrew from the case. Notice of Withdrawal of Joseph D. Kuchta, October 26, 1998. Respondent promptly hired new counsel, who was aware of the hearing date when he agreed to represent respondent.⁵ It was respondent's choice to change counsel three weeks before a hearing that had been set five months prior and he offered no evidence of extenuating circumstances to explain why he made the change at such a late date.⁶ In addition, respondent identified neither specific prejudice that befell him due to the denial of a continuance nor due process that he was denied and identified nothing that he would have done differently had a continuance been granted.⁷

Regarding the law judge's finding on the 91.13(a) charge, respondent argues that, in the connected case of Administrator v. Excalibur Aviation, Inc., NTSB Order EA-4465 (1996)(the company

⁵Due to an apparent scheduling conflict, an associate of the new counsel represented respondent at the hearing.

⁶Furthermore, respondent did not claim at the hearing that he was unfairly prejudiced by the denial of his Motion for Continuance and, thus, did not preserve the issue for appeal.

⁷See Administrator v. Robbins, NTSB Order No. EA-4156 (1994)(late-hiring of counsel not good cause for delay of hearing); Administrator v. Conahan, NTSB Order No. EA-4044 (1993) (circumstances which caused Administrator's counsel to leave in midst of hearing were foreseeable; denial of continuance not abuse of discretion); Administrator v. Hasley, NTSB Order No. EA-3971 (1993)(no abuse of discretion where continuance denied even though new counsel retained a few days before hearing; no showing of what respondent would have done differently had continuance been granted).

for which respondent made the flights at issue), the law judge did not uphold the 91.13(a) charge and, therefore, it should not be sustained in his case. He contends that the evidence does not show that he operated the aircraft in a careless or reckless manner and that finding the violation was residual to the operational violations is improper for public policy reasons.

While the law judge did not sustain the 91.13(a) charge in the Excalibur case and the related case of Lee Allen (pilot and Vice President for Excalibur), the Administrator did not appeal those findings. Initial decisions are not precedent binding on the Board. See 49 C.F.R. § 821.43. It is the evidence adduced in the instant case that must support the charges against respondent.

The law judge found that respondent acted as PIC on two charter flights for Excalibur Aviation, in Part 135 service, when he was not qualified to do so. He specifically determined that respondent should have known the flights were not being operated under a rental agreement and also should have known that, to act as PIC on those passenger-carrying flights, he had to be qualified under FAR Part 135. (Transcript at 148.) Even though the law judge characterized his finding as one of a residual violation of 91.13(a), the facts he found clearly support an independent finding of careless operation.⁸

⁸The Administrator specifically alleged that the operations as described in the complaint were careless and reckless and endangered the lives or property of others.

Respondent transported customers in Part 135 operations when he knew that he had not passed the required tests and checks for that service and knew he was not listed as a pilot on Excalibur's Operations Specifications. He also operated an aircraft in IFR⁹ conditions, with paying passengers, when he did not have the requisite flight hours to do so. These actions clearly support an independent violation of section 91.13(a). Thus, respondent's argument that a finding of a residual violation of section 91.13(a) is improper is moot.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 75-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.¹⁰

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁹Instrument Flight Rules.

¹⁰For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).